

**AN ANALYSIS OF KESAVANANDA BHARATI V. STATE OF  
KERALA**

**The case that saved the Constitution of India**

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**Introduction**

On April 24, 1973, a historic 13 judge bench of the Supreme Court delivered the longest judgment by the Court in a case that would later change the constitutional and democratic landscape of India. This was the largest bench ever constituted for a case that would run for a marathon 68 days. *Kesavananda Bharati v. State of Kerala*<sup>1</sup> was a case of immense scholarship and judicial genius which profoundly changed the future of the Indian democracy by curtailing Parliament's right to amend provisions of the Constitution and propounding the 'basic features' doctrine. The basic question that the Court had to decide upon was whether the Parliament had unlimited powers to amend the Constitution or was there any implied limitation on such amending power.

The 68 day hearing had arguments on all issues at length by all the parties and ultimately ended with a water-thin majority of 7: 6, where the Supreme Court held that while the Parliament has "wide" powers, it did not have the power to destroy or emasculate the basic elements or fundamental features of the constitution. Thus it was held that the power of the Parliament to amend the Constitution was not unlimited and that the amending power cannot be used to alter the basic structure or essential features of the Constitution.

The judgment had far reaching consequences which arguably established the supremacy of the Constitution of India by pronouncement of the doctrine of 'basic structure'. This case holds immense significance also on account of setting

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<sup>1</sup> AIR 1973 SC 1461 : (1973) 4 SCC 225

the final authority on the issue of amendability of the Constitution. The issue of whether or not the Parliament had unlimited power to amend the Constitution had already been heard in three prior landmark cases viz. the Shankari Prasad case<sup>2</sup>; the Sajjan Singh case<sup>3</sup> and then in the landmark case of Golak Nath v. State of Punjab<sup>4</sup> which was ultimately overruled in Kesavananda Bharati case

### Facts of the Case

The factual summary of the case is as follows –

- Kesavananda Bharati was a religious leader whose full name was ‘His Holiness Kesavananda Bharati Sripadagalvary’ and was the head of *Edneer math*<sup>5</sup>. He challenged the Kerala government’s attempts, under two state land reform acts, to impose restrictions on the management of its property.
- On March 21, 1970 he directly filed a writ petition under Article 32 before the Supreme Court challenging certain provisions of the Kerala Land Reforms Act, 1963 and the Kerala Land Reform (Amendment) Act, 1969.
- The Kerala High Court had previously struck down certain provision of both the Acts, however later by the Constitution (Twenty-Ninth Amendment) Act, 1972, the Acts of 1969 and 1971 were inserted in the Ninth Schedule and thus out of the scope of review by the Supreme Court.
- Accordingly, Kesavananda Bharati filed an application to amend his petition and the altered petition challenged the validity of Kerala Land

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<sup>2</sup> Shankari Prasad v. Union of India, AIR 1951 SC 458 : [1952] 1 SCR 89.

<sup>3</sup> Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845 : [1965] 1 SCR 933.

<sup>4</sup> I.C. Golak Nath v. State of Punjab, AIR 1967 SC 1643 : [1967] 2 SCR 762.

<sup>5</sup> *Math* or *Mutt* is a Hindu religious institution presided over by a person who exercises spiritual leadership over the body of disciples.

Reforms Act, 1971 and the Constitution (Twenty-Ninth Amendment) Act, 1972.

- The constitutional validity of several constitutional amendments was challenged in the Kesavananda Bharati case. The government of the day brought several amendments to annul the recent decisions of the Court against the government.
- Constitution (the 24th, 25th, 26th and 29th) had been enacted through Parliament to get over the judgments of the Supreme Court in the *Bank Nationalisation*<sup>6</sup> (1970), *Privy Purses*<sup>7</sup> (1970) and *Golak Nath*<sup>8</sup> (1967) cases. An additional Article 31C was also inserted by the 29<sup>th</sup> Amendment, the constitutional validity of which was also questioned before the Court.

### **History and Background**

Every constitutional case has a political and judicial history attached to it, and the case of Kesavananda Bharati can best be understood in the context of various judicial decisions and political events that preceded it.

### **Judicial History**

Since 1951, several questions were raised about the scope of Parliament to amend the Constitution under Article 368. The fundamental question was whether the

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<sup>6</sup> R.C. Cooper v. Union of India, AIR 1970 SC 564 : (1970) 1 SCC 248.

<sup>7</sup> Madhav Rao Scindia v. Union of India, AIR 1971 SC 530 : (1971) 1 SCC 85.

<sup>8</sup> I.C. Golak Nath v. State of Punjab, AIR 1967 SC 1643 : [1967] 2 SCR 762.

Parliament could amend the *Fundamental Rights* enshrined in Part III of the Constitution. The most contentious of these Fundamental Rights was the Right to Property contained in Article 31 which was amended several times. The main motive behind these amendments was to immunize state interference with property rights (to acquire land for agrarian reforms) from challenge under Article 14, 19 and 31 as well as to exclude the issue of reasonable compensation after acquiring of land from judicial review. These amendments were challenged several times before the Supreme Court.

### **1. Shankari Prasad Singh v. Union of India**

In this case, the constitutional validity of the Constitution (First Amendment) Act, 1951 was challenged as being in violation with Article 31 which guaranteed the *Right to Property*. The first amendment created the Ninth Schedule in the Constitution where laws put in the schedule were immune from judicial scrutiny. After independence a lot of agrarian reforms and land acquisition acts were struck down by High Courts as being in violation of Article 31 of the Constitution. Henceforth, the Parliament passed the Constitution (First Amendment) Act, 1951 where any act in the Schedule will be immune from judicial review.

It was argued by the petitioners that Article 13 prohibits enactment of any law abrogating or infringing the Fundamental Rights and that law in the present Article includes Constitutional Amendments leading to a conflict between Article 368 and Article 13. The Supreme Court upheld the validity of the Constitution (First Amendment) Act, 1951 and limited the scope of Article 13 by ruling that the word '*law*' in Article 13 does not include laws to amend the Constitution. It was thus held that the power of the Parliament to amend the Constitution is unlimited.

## 2 Sajjan Singh v. State of Rajasthan

For 13 years following the Shankari Prasad case, the question of amendability of the Fundamental Rights remained dormant. It was raised again in 1964 in *Sajjan Singh v. State of Rajasthan* where the constitutional validity of the Constitution (Seventeenth Amendment) Act, 1964 was challenged. This amendment again added certain statutes affecting property rights to the Ninth Schedule and thus immunizing them from judicial purview. The Supreme Court by a majority of 3:2 upheld the validity of the Constitution (Seventeenth Amendment) Act, 1964 and refused to review the Shankari Prasad case. It was observed that the word *law* as used in Article 13 does not include laws made in the 'constituent' power and thus the power of the Parliament to amend the Constitution remained unlimited even after this case. However out of the five judges, two<sup>9</sup> gave a dissenting judgment curtailing the powers of the Parliament to amend the Constitution. Most interestingly, Justice Mudholkar in his judgment introduced the concept of *basic features* which was later the most defining part of the Kesavananda Bharati judgment.

## 3 Golak Nath v. State of Punjab

In this case, 418 acres of land belonging to Henry Golak Nath was declared surplus under the Punjab Security of Land Tenures Act, 1953. Later, this Act along with Mysore Land Reforms Act, 1961 was inserted into the Ninth Schedule by the Constitution (Seventeenth Amendment) Act, 1964. The petitioners henceforth challenged the validity of Constitution (1<sup>st</sup>, 4<sup>th</sup> and 17<sup>th</sup> Amendment) Act as the Sajjan Singh case followed the judgment in the Shankari Prasad case and thus both the decisions had to be overruled for the petitioners to succeed.

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<sup>9</sup> Hidayatullah J, Mudholkar J

In a bench of 11 judges, by a majority of 6:5 it was held that the Parliament could not amend Fundamental Rights which occupy a “transcendental” position in the Constitution. The judgment in *Shankari Prasad*<sup>10</sup> and *Sajjan Singh*<sup>11</sup> was overruled and it was now ruled that the word ‘law’ in Article 13 also includes laws to amend the Constitution or constitutional amendments.

However this judgment was widely criticized for rendering the Parliament absolutely powerless to amend or alter any of the Fundamental Rights in Article 14 and 32. Six years later in 1973, it was historically overruled in the *Kesavananda Bharati* judgment.

### **Political Events Preceding *Kesavananda Bharati v. State of Kerala***

The decision in *Kesavananda Bharati* can best be understood by taking into account, the various political events that preceded this case. After the landmark *Privy Purses* case, Prime Minister Indira Gandhi requested the President to dissolve the Parliament and call for fresh elections. Socialistic rhetoric was at its zenith and with the famous slogan ‘*garibi hatao*’.<sup>12</sup>, Mrs. Indira Gandhi led her party to a stunning victory, gathering almost 350 seats out of the total strength of 540.<sup>13</sup> The governments passed several constitutional amendments to overrule the decisions in *Golak Nath*, *Bank Nationalisation*, and the *Privy Purses* case. The 24<sup>th</sup>, 25<sup>th</sup> and 26<sup>th</sup> constitutional amendments were passed to annul the decisions in *Golak Nath*, *Bank Nationalisation* and *Privy Purses* case respectively.

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<sup>10</sup> Supra 2

<sup>11</sup> Supra 3

<sup>12</sup> Translation, ‘abolish or remove poverty’

<sup>13</sup> S.J. Sorabjee, A.P. Datar, Nani Palkhiwala -The Courtroom Genius, 104(3<sup>rd</sup> ed., 2012)

## Constitutional Amendments

On July 22, 1971, the Twenty Fourth and Twenty Fifth Amendments were introduced with the objective to overrule the judgments in the three cases.<sup>14</sup> The **Twenty Fourth Amendment**<sup>15</sup> sought to overrule the *Golak Nath* verdict by amending Article 13 and 368. It was now clarified that Article 13 would not stand in the way of any amendment made under Article 368 as an extra clause was inserted that excluded any constitutional amendment Act from being reviewed under Article 13. Article 368 was also amended declaring that Article 13 shall not apply to any amendment made under Article 368. Interestingly, the marginal note to Article 368 was now changed from “Procedure for Amendment of the Constitution” to “Power of Parliament to amend the Constitution and Procedure there for” giving Parliament unlimited power to amend the Constitution.

The **Twenty Fifth Amendment**<sup>16</sup> altered Article 31 and inserted an additional Article 31C to the Constitution. This amendment substituted the word ‘compensation’ as in Article 31 with the word ‘amount’ and thus ensured that any amount paid, no matter how ridiculous, cannot be reviewed by the Court. An additional Article 31C was also inserted with the objective of protective laws for implementation of Directive Principles specified in Article 39(b) and (c). This meant any law that was merely introduced with the declaration ‘to give effect to the Directive Principles specified in Article 39(b) and (c) could not be reviewed by the Court.

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<sup>14</sup> *Golak Nath*, *Bank Nationalisation*, and the *Privy Purses* case.

<sup>15</sup> The Constitution (Twenty Fourth Amendment) Act, 1971

<sup>16</sup> The Constitution (Twenty Fifth Amendment) Act, 1971

As discussed earlier<sup>17</sup>, the **Constitution (Twenty Ninth Amendment) Act, 1972** that made two land reform amendments made in 1969 and 1971 to the Kerala Land Reforms Act, 1963 was also challenged by the petitioner in the present case.

### **Issues before the Court**

- Whether *Golak Nath* was correctly decided or is it liable to be overruled?
- Whether the Constitution (Twenty Fourth Amendment) Act, 1971 is valid?
- Whether Section 2 of the Constitution (Twenty Fifth Amendment) Act, 1971 is valid?
- Whether Section 3 of the Constitution (Twenty Fifth Amendment) Act, 1971 that inserted Article 31C valid?
- Whether the Constitution (Twenty Ninth Amendment) Act, 1972 valid?

### **Judgment of the Court**

The judgment was finally delivered by the Supreme Court on April 24, 1973 after a marathon hearing of 68 days. The bench was clearly divided with the the minority of six judges holding that the Parliament had unlimited power to amend the Constitution whereas the majority of seven judges opining that the power of the Parliament to amend the Constitution is indeed limited and that it could not alter the *basic structure* of the Constitution. The decision of the Court can be summed up in the following points:

### ***Golak Nath* overruled**

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<sup>17</sup> Refer to '*Facts of the Case*'

The 13 judges' bench overruled the judgment in the *Golak Nath* case with nine out of thirteen judges clearly overruling the precedent. These judges made a clear distinction between ordinary laws and the Constitution on the 'criterion of validity.' The court opined that ordinary laws depend on a higher law for establishing its own validity whereas in the case of constitutional law, its validity is inherent and does not depend on another law in order to generate its validity.

18

### **Limitations on amending powers of the Constitution**

On the issue of the Twenty-fourth Amendment, the Court held that amending powers of the Parliament were not unlimited or absolute and that the courts can invalidate the same if it destroys the *basic features* of the Constitution. It was observed that the word 'amend' as used in Article 368 has a restrictive connotation and does not comprise a fundamental or basic feature of the Constitution.<sup>19</sup> The court also held that Fundamental Rights are in the ambit of the *basic structure* of the Constitution and that only reasonable abridgement of the same was possible.

### **Section 2 of the Twenty-fifth Amendment**

Section 2 of the Twenty-fifth Amendment substituted the word 'compensation' as used in Article 31(2) with the word 'amount'. It was also added that the amount that shall be paid after acquiring a property shall be in accordance with the principles or rules as enshrined in the appropriate law. However, the main contention in the matter was with the part that stated that such a law cannot be

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<sup>18</sup> Prof. P.K. Tripathi, *Kesavananda Bharati v. State of Kerala – Who wins* (1974) 1 SCC(Jour) 35

<sup>19</sup> MP Jain, *Indian Constitutional Law* (6<sup>th</sup> ed., 2011)

questioned in any court on the ground that the amount determined is not adequate.

The Court upheld the substitution of the word ‘compensation’ by the word ‘amount’ unanimously. However, by a majority of 7: 6 it was held that the court could interfere with the amount paid if it was illusory or the law specifying the amount was against the ideals of the Constitution. Thus, if the amount paid was unreasonably less as compared to the market price or arbitrarily decided, the court could intervene and provide relief to the former landowners.

### **Article 31C partly struck down**

The Twenty-fifth Amendment inserted Article 31C, which made fundamental rights subservient to Directive Principles of State Policy as enshrined in Part IV of the Constitution. Article 31C basically stated that any law that is passed in order to secure the principles as specified in Article 39(b) and (c) cannot be declared void on the ground that it is inconsistent with Article 14, 19 or 31. Also any law that would merely contain a declaration that it is for giving effect to Article 39(b) or (c), cannot be questioned in any court on the ground that *it does not give effect to such policy*.

Seven out of thirteen judges held that the latter part of Article 31C was unconstitutional and hence it was declared invalid by the Court. The latter part prevented judicial review of any law that merely contained a declaration that the particular law was intended to give effect to Article 39 (b) or (c). The objective of this ruling was that while a law enacted to implement Article 39 (b) and (c) may not be challenged under Article 14, 19 or 31, however still, the court shall still have the power to question the law on the ground if it does in fact achieve the objectives as stated in Article 39 (b) and (c) or not.

### Analysis of the Judgment

The judgment of the Supreme Court in the present case holds great significance in the democratic and constitutional framework of India; being one of the most discussed and celebrated decision of the Court. The case involved extensive research and unbelievable scholarship on the part of all the stakeholders. Apart from previous Supreme Court decisions, decisions from England, United States of America, Australia, Ireland, Canada and Ceylon were also put forth before the Court.

The significance and authority of this case is also increased manifold due to the crucial issue that it decided upon. As earlier stated, the Supreme Court had already decided upon this issue in three earlier cases<sup>20</sup>, the last of which was decided by an 11 judges' bench in *Golak Nath v. State of Punjab*. The *Golak Nath* case rendered the Parliament completely powerless in amending Fundamental Rights as it was held that 'law' as stated in Article 13 includes the laws made by the Parliament in its constituent authority. The present case overruled the decision in *Golak Nath* and made a clear distinction between ordinary law and the Constitution based on the concept of 'criterion of validity'. The court also propounded the landmark *basic structure* doctrine to limit the power of the Parliament to amend the Constitution. In the author's opinion, this distinction made by the court was appropriate as there is a fundamental difference between ordinary law and the Constitution due to different standards of validity. The view held in *Golak Nath* was flawed and erroneous as it made the Constitution rigid by way of totally curtailing the power of the Parliament to amend Fundamental Rights. The society is constantly evolving and so is the scope and ambit of the concept of fundamental rights. Keeping this in mind, a

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<sup>20</sup> The first two being, the *Shankari Prasad* case and *Sajjan Kumar* case.

rigid and unalterable interpretation of fundamental rights would hamper the development of the Constitution according to the changing times and thus, it was necessary to keep the Fundamental Rights alterable, however any change in its basic structure was disallowed.

The Twenty-fourth Amendment as discussed was brought to annul the decision of the Court in *Golak Nath* by amending Article 13 and 368 to grant unlimited power to the Parliament to amend the Constitution. As was rightly argued by the counsel<sup>21</sup> for petitioners, by enactment of the Twenty-fourth Amendment, the Parliament enlarged its constituent power beyond what was conferred by the Constitution. On this issue, the court held that fundamental rights being a part of the *basic structure* could not be abrogated by the Parliament under Article 368. However, reasonable alterations to the rights were permissible. It has to be noted that the six judges<sup>22</sup> who opined in favour of unlimited power of amendment placed immense faith in our elected representatives, rejecting the possibility of misuse of power which was clearly witnessed some years later in the form of emergency.

Another major contention was that about the validity of Article 31C which sought to make the fundamental rights subservient to the directive principles. The second part of this provision which sought to exclude any amendment with a mere declaration that it enforced Article 39 (b) and (c) from judicial review was struck down by the court. The court rightly invalidated the latter part on the ground that it would destroy the basic structure. This Article would have had drastic implications adverse to the democratic and constitutional framework of

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<sup>21</sup> N.A. Palkhiwala, assisted by S. Sorabjee, A. Diwan, D.M. Papat, R. Narain, M.L. Bhakta and J.B. Dadachanji.

<sup>22</sup> Justices Ray, Palekar, Mathew, Beg, Dwivedi and Chandrachud.

India, as any law passed with a simple majority would reduce Article 14, 19 and 31 to a 'dead letter'<sup>23</sup>, with the mere declaration that the law was intended to enforce Article 39 (b) and (c).

The **doctrine of basic structure** was the most significant part of this judgment. The basic structure doctrine restored the power of the Parliament to amend any provision of the Constitution, however at the same time; these amendments had to qualify the test of whether they erode the essential features or basic structure of the Constitution. It was left to the discretion of the Court to identify various fundamental features from case to case. However, certain features which were regarded by the Court as fundamental and non amendable were:

- Supremacy of the Constitution;
- Secular character of the Constitution;
- Republican and Democratic forms of government;
- Federal character of the Constituion;
- Separation of Powers between the legislature, executive, and judiciary.

An unqualified amending power to the Parliament would mean that comes into power with a two-third majority could very easily abrogate the entire Constitution and might even establish a totalitarian state devoid of all fundamental rights.<sup>24</sup> It was rightly observed by the Court that the Constitution which was enacted in the name of "People of India" derives its strength from national consensus and that it cannot be amended by a mere 2/3<sup>rd</sup> majority in the Parliament as it does not represent a very broad consensus of the citizens of the country. The court also observed that the Constitution was not merely a political

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<sup>23</sup> Justice H.R. Khanna

<sup>24</sup> N.A.Palkhiwala, *Our Constitution Defaced and Defiled*, 147 (1974)

document but essentially it was also social in nature. Every social philosophy has two main features, basic and circumstantial where the basic part of the philosophy stays constant while the circumstantial features evolve with respect to time and changes in society. Likewise, the Constitution of India has certain inherent basic features which are so essential that they cannot be changed or destroyed.<sup>25</sup>

### **Conclusion**

This case is a clear example of judicial brilliance and creativity of the Supreme Court. The doctrine of basic structure as propounded in this case saved Indian democracy, its supremacy of the Constitution and preserved rule of law in the country. The political events that followed this case, from supersession of judges to imposition of emergency and another clumsy attempt to review this case, made the decision even more justified, rational and imperative. This was a narrow victory for the democratic and constitutional framework of India with a dramatic 7:6 verdict. There can be no denial of the fact that the formulation of the theory of basic structure saved democracy and preserved the rule of law.

The Supreme Court applied this doctrine several times after this case to invalidate or strike down provision that damaged the basic structure of the Constitution. The most recent example of which was the NJAC case<sup>26</sup> where the court struck down the National Judicial Appointment Commission Act and the 99<sup>th</sup> amendment to the Constitution as being in violation of basic features of the Constitution.

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<sup>25</sup> Hegde and Mukherjee, JJ.

<sup>26</sup> Supreme Court Advocates-On-Record V. Union Of India, Writ Petition (Civil) No. 13 Of 2015



In conclusion it can be said that the case of *Kesavananda Bharati v. State of Kerala* saved Indian democracy and the Constitution from any encroachments on its essential or fundamental features. Even though this case left a major question unanswered as to what constituted the basic structure, it still ensured that no government can abrogate or distort the shape of the Constitution and the *democratic republic* of India.

